

Chuck

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\*\*\*\*\*

IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT )  
411-111746 by MINERAL RIGHTS )  
UNLIMITED, LLC )

FINAL  
ORDER

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The Proposal for Decision in this matter was entered by the Department of Natural Resources and Conservation (Department or DNRC) Hearing Examiner on February 15, 2002. In the Proposal for Decision the Hearing Examiner recommended denying a new beneficial water use permit. Although some criteria for a new water use permit were found to have been proven, several were not. The Hearing Examiner found the applicant had not proven by a preponderance of evidence physical availability, legal availability or lack of adverse effect (including lack of adverse effect to water quality). See Mont. Code Ann. § 85-2-311. The Applicant filed timely exceptions to the Proposal for Decision along with a brief in support. Objector Kleffner Family Trust filed a response to Applicant's exceptions and argued in support of the Proposal for Decision as issued.

Oral argument was requested by the Applicant and was held on June 6, 2002, in Helena. Parties participating at oral argument were the Applicant represented by Attorney Charles Petaja, Objector Kleffner Family Trust represented by Attorney Carl Hatch, Objector Day Spring Land Company represented by Attorney John Shontz, and Objector Lynn Hall Wiese representing herself.

Applicant excepted to Findings of Fact numbers 4,5,6,7,8,9,10,11,19,20, and 21 of the Proposal for Decision. Applicant also objected to Conclusions of Law numbers 3,4,5,9,12 and 13 of the Proposal for Decision. These exceptions pertain to the Hearing

Examiner's findings and conclusions that the aforementioned Water Use Act criteria found in Mont. Code Ann. § 85-2-311 were not met.

In this review the Department may, pursuant to Mont. Code Ann. § 2-4-621 (3) and Mont. Admin. R. 36.12.229 (1999), adopt the proposal for decision as the Department's Final Order. The Department in its Final Order may reject or modify the conclusions of law and interpretation of administrative rules in the Proposal for Decision, but may not reject or modify the findings of fact unless it first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence, or that the proceedings on which the findings were based did not comply with essential requirements of law. The Department has considered the exceptions and reviewed the record under these standards.

The Applicant's exceptions disagree with the Hearings Examiner's findings and conclusions that the Applicant has not proven physical availability, legal availability and lack of adverse effect by a preponderance of the evidence. Applicant argues that it has submitted uncontradicted expert testimony concerning proof of the ultimate issues of physical availability, legal availability, and no adverse impact, and therefore has met its initial burden.

Although it is true that only the Applicant provided expert witness testimony, the Hearing Examiner did not find that the Applicant's initial burden was met. In fact, the Hearing Examiner found the contrary. As to physical availability, the Hearing Examiner ruled, "No evidence was presented to show *how much* of the water volume the Orsborn formula predicts is available to Applicant in the proposed shallow pits." Proposal for Decision, Finding of Fact No. 4. (emphasis added). In regard to legal availability, the Hearing Examiner ruled, "The record contains no hard evidence to show the water proposed for diversion is *not* destined for the prior rights of Kleffner or Wiese." Id.,

Finding of Fact No. 10. (emphasis added). In regard to adverse effect, the Hearing Examiner heard testimony of interference with other water rights from Applicant's use of water and ruled, "Applicant's expert indicated the likely cause was not Applicant's water use, but offered no additional evidence that might explain the difference.", Id., Finding of Fact No. 11, and, "Applicant did not provide any other information on adverse effect." Id., Finding of Fact No. 12. In regard to adverse effect to water quality, the Hearing Examiner found a valid objection to water quality was filed against the application, thus putting the burden on the Applicant to prove lack of adverse effect, but found, "The record *does not* show that the material being mined and coming in contact with the water during the placer operations *does not* have contaminants that will diminish the water quality of prior appropriators to where it is no longer usable for the historic uses." Id., Finding of Fact No. 21. (emphasis added).

Thus, the Hearing Examiner never found the Applicant's initial burden was met, expert witnesses or not, so the burden of production never shifted to the Objectors on these issues, and it was not fatal that they did not produce expert witnesses of their own.

The Applicant overstates the involvement of "experts" in its case. The record in this case discloses no expert reports or evidence submitted with the application in the first instance. After the application was submitted the Department had one of its staff geohydrologists do a limited review of the application. A reading of the staff geohydrologist's report discloses that it was no more than a cursory examination of the application materials provided by the Applicant without any type of on-site technical studies or data gathering. At hearing the Applicant produced an expert witness, a hydrologist, but the extent of his involvement was a review of the Department staff hydrologist's cursory review of the application materials. The staff geohydrologist's report is full of qualifiers and speculation because of the lack of information in the

application: "[t]he pit(s) *probably* intercepts groundwater in a thin (15 –30 feet thick ?) layer of alluvium and placer tailings along Holmes Gulch"; "[s]hallow groundwater is *probably* poorly connected to bedrock aquifers"; "pumping *probably* has minimal impact on water levels in wells completed in bedrock"; "small dissolved concentrations *probably* will be reduced to insignificant levels by dilution in groundwater"; "[w]ater quality, overflow volume, and groundwater flow *data* are needed to evaluate the level of water quality impact more precisely, however." October 2, 2001, Report on Applications 411-P-111746-00 by DNRC Geohydrologist Russell Levens – Department file. (emphasis added). Thus, since the Applicant's expert witness merely reviewed a Department analysis that had to speculate based on available application information, his involvement was minimal, and was not based on any of his own independent studies or data regarding physical availability, legal availability, or adverse effect (including adverse effect to water quality). As the Hearing Examiner emphasized at another point:

The Department application file reports were reviewed by Applicant's hydrologist; however, Applicant provided no additional hydrologic evidence to show water is available.

Proposal for Decision, Finding of Fact No. 6.

Therefore, simply hiring someone who has expert credentials, and having them testify, is not automatically enough, as in this case, to prove the necessary Water Use Act criteria, even in the absence of contrary *expert* testimony from Objectors.

In addition to the Applicant's not proving physical availability, legal availability, and lack of adverse effect by a preponderance of the evidence, the Hearings Examiner heard from the Objectors themselves who found their historic use of water interrupted by Applicant's operations, and who found their historic use of water return to normal during the cessation of those operations. Id., Finding of Fact Nos. 8, 9, 11. In Montana,

the courts have long recognized the value of the testimony of water users themselves along with that of the experts in arriving at their decisions:

Appellants contend that this court should entirely disregard the testimony of all the witnesses for the respondents, as well as that of the respondents themselves, and determine the case solely upon the testimony of the irrigation engineers. In the Joerger case just cited, the court said: "Defendants call our attention to the fact that many of the plaintiff's witnesses are farmers, and that their testimony is at variance with that of defendants' experts. Plaintiff, too, produced experts in support of his claims, but the trial court was not bound to accept the testimony of any of these witnesses to the exclusion of the farmers who were familiar with the character of the lands and its needs. Their testimony was also entitled to be considered. It has been said that this character of testimony is of a higher quality than the mere opinion of an expert; that it is the difference between practice and theory, between experience and observation or examination." See, also, Stinson Canal & Irrigation Co. v. Lemoore Canal & Irrigation Co., 45 Cal.App. 241, 188 P. 77.

Worden v. Alexander, 90 P.2d 160, 163, 108 Mont. 208, 215-216 (1939). (emphasis added).

Similarly, in this case the Hearing Examiner heard from both experts and the water users themselves, and he was not persuaded by the strength of Applicant's expert testimony. The Applicant did not make out a prima facie case. Instead, the Hearing Examiner found it unclear whether the Objectors' water uses were affected by the Applicant's use of water, and he found the Applicant did not prove by a preponderance of evidence that water was physically available and legally available and did not adversely affect the Objectors water rights.

The Applicant relies on Mont. Code Ann. §§ 26-1-301, 401 and 403, but those statutes do not mandate anything in a case where facts are disputed. Mont. Code Ann. § 26-1-301 simply says the direct evidence of one witness *who is entitled to full credit* is sufficient for proof of any fact. But here the Hearing Examiner, the fact finder, chose to believe other witnesses -- the fact finder is not *mandated* to believe Applicant's witness.

Mont. Code Ann. § 26-1-401, which states who has the initial burden of producing evidence, does not add anything to this case because Mont. Code Ann. § 85-2-311 already states clearly that the Applicant bears the burden of proving the Water Use Act statutory criteria by a preponderance of evidence. And Mont. Code Ann. § 26-1-403 adds nothing here, because no jury trial is involved and, again, it is already clear by statute the Applicant bears the burden of proof in this case.

The burden of persuasion always remained on the Applicant, and at most the burden of production on the above issues would have shifted to the Objectors only if the Applicant had made out a prima facie case. See, e.g., Montana Rail Link v. Byard, 260 Mont. 331, 860 P.2d 121 (1993)(if plaintiff can establish prima facie case of employment discrimination, burden shifts to employer to articulate some legitimate, nondiscriminatory reason for the rejection; it is the burden of production, not the burden of persuasion, which shifts to the employer as the burden of persuasion remains on the complainant throughout the analysis). As one court explained:

"Burden of proof" is an amorphous term, comprising both the "burden of production" and the "burden of persuasion," .... Thus, the burden of production is not forever on one party; rather, it is an evidentiary tool that shifts from one party to another. It is the burden of persuasion that rests at all times with the plaintiff.

In re Lewis, 845 F.2d 624, 634 (6th Cir. 1988).

In this case the Hearing Examiner properly set forth in his findings and conclusions the basis of his decision. As the Montana Supreme Court recently stated in In Re The Marriage Of Marvin Phillip Drake, 2002 MT 127, \_\_\_Mont\_\_\_, \_\_\_P.3d\_\_\_:

... the district court is not required to make specific findings on every fact presented or every piece of evidence offered. It need only include "the essential and determining factors upon which [its] conclusions rest." Moseman v. Moseman (1992), 253 Mont. 28, 31, 830 P.2d 1304, 1306.



**THEREFORE**, the Department finds the Proposal is supported by the record and that the law was properly applied to the facts, and hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the February 15, 2002, Proposal for Decision, and incorporates them by reference.

Based on the record in this matter, the Department makes the following:

**ORDER**


The Proposal for Decision in this matter dated February 15, 2002, is adopted and affirmed, and Application For Beneficial Water Use Permit 411-111746 by Mineral Rights Unlimited, LLC, is hereby **DENIED**.

**NOTICE**

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape or the oral proceedings to the district court.

Dated this 16<sup>th</sup> day of August, 2002.

  
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Tim D. Hall  
Legal Counsel  
Department of Natural  
Resources and Conservation  
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## CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Final Order was served upon all parties and all other individuals listed below on this 16 day of August, 2002.

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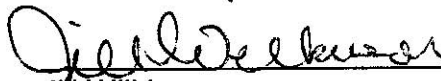
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BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\*\*\*\*\*

IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT )  
[REDACTED] ) PROPOSAL FOR DECISION  
[REDACTED] MINERAL RIGHTS )  
UNLIMITED LLC )  
\*\*\*\*\*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. § 85-2-307, a hearing was held on January, 10, 2002, in Helena, Montana, to determine whether a beneficial water use permit should be issued to the Applicant for the above application under the criteria set forth in Mont. Code Ann. § 85-2-311.

APPEARANCES

Applicant appeared at the hearing by and through counsel Charles E. Petaja. Dan Prebil, Manager, Mineral Rights Unlimited, LLC (hereafter MRU) testified for the Applicant. Objector Kenneth Diehl; and Dan March, Land and Water Consulting, were called to testify by the Applicant.

Objector Day Spring Land Company appeared by and through counsel John M. Shontz. Kenneth Diehl, primary stockholder in Day Spring Land Company testified for Day Spring Land Company.

Objector Kleffner Family Trust (Objector Kleffner) appeared by and through counsel Carl A. Hatch. Alice Dove, Trustee, Kleffner Family Trust, testified for Kleffner Family Trust.

Objector Lynne Hall Wiese appeared at the hearing in person.

Jim Beck, Civil Engineering Specialist, Helena Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) was called to testify by the Applicant.

EXHIBITS

Both Applicant and Objectors offered exhibits for the record.

Applicant offered eleven exhibits for the record. The Hearing Examiner accepted and admitted into evidence Applicant's Exhibits 1-5 and 9-14. Exhibits 6-8 were not offered.

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**Applicant's Exhibit A1** a seven page copy of a Minerals Exploration and Mining Lease Agreement.

**Applicant's Exhibit A2** is a copy of a Notice of Completion for a MRU pit.

**Applicant's Exhibit A3** is a copy of a Montana Well Log Report for a 200' deep MRU well.

**Applicant's Exhibit A4** is a two page copy of a Notice of Completion for a MRU well.

**Applicant's Exhibit A5** is copy of Certificate of Water Right number 41I-C116572 for a MRU well.

**Applicant's Exhibit A9** is a three page copy of a letter from Charles Petaja to John Shontz dated May 9, 2001.

**Applicant's Exhibit A10** is a copy of an MRU A/P Aging Summary dated June 15, 2001.

**Applicant's Exhibit A11** is a three page copy of RELEASE OF ALL CLAIMS, Montana First Judicial District Court, Cause No. ADV-2001-339.

**Applicant's Exhibit A12** is a two page copy of a STIPULATION FOR DISMISSAL AND ORDER, Case No. ADV 2001-339, Montana First Judicial District, Lewis and Clark County.

**Applicant's Exhibit A13** is a large topographic map of the project area.

**Applicant's Exhibit A14** is a two page letter from Land & Water Consulting regarding the Orsborn calculation.

Objector Day Spring Land Company offered six exhibits for the record. The Hearing Examiner accepted and admitted into evidence Objector's exhibits 1-6.

**Objector's Exhibit D1** is a fifteen page copy of the Day Spring Land Company objection.

**Objector's Exhibit D2** is a seven page copy of Minerals Exploration and Mining Lease Agreement.

**Objector's Exhibit D3** is a two page copy of a Montana DEQ Small Miner Exclusion Statement.

**Objector's Exhibit D4** is five pages of Shontz - Beck correspondence.

**Objector's Exhibit D5** is a seven page copy of a letter from John Shontz to Charles Petaja regarding a Water Use Complaint received March 5, 2001.

**Objector's Exhibit D6** is a four page copy of a Mortgage dated June 11, 1911 from Burgess to Loeb.

Objector Kleffner offered eight exhibits for the record. The Hearing Examiner accepted and admitted into evidence Objector's Exhibit 1-7. Exhibit K8 was not submitted.

**Objector's Exhibit K1** is a large topographic map showing the location of Kleffner Family Trust pipeline from their spring to their place of use.

**Objector's Exhibit K2** is a two page copy including a department *Water Right Information* sheet, and a *Correction of Water Right Record*, both for water right 41I E093989.

**Objector's Exhibit K3** consists of two pages containing three photos with text description.

**Objector's Exhibit K4** is a copy of a sales receipt for excavation work.

**Objector's Exhibit K5** consists of three pages containing six photos with text description.

**Objector's Exhibit K6** is one page containing two photos.

**Objector's Exhibit K7** is a two page copy of a "Water Use Complaint".

**Objector's Exhibit K9** is a four page summary by Alice Dove and Chuck Kleffner of water related issues in this matter. The objection to admission of Exhibit K9 was sustained. The summary document was not written under oath.

#### **PRELIMINARY MATTERS**

Objectors Marvin Holmquist, Leonard Mahlum, and Michael Rasmussen made initial appearances; but, they did not return from the mid-day lunch break. These objectors did not make an opening statement, and were not available at their opportunity to present argument. Objectors Glenn Blalock, Robert and Linda Seeley-Buckland-Piccolo, Cathy M. Ward, Richard and Mary Gee, Robert Shepard, David and Lori Jeseritz,

Vince and Dixie Hoff did not appear at the hearing. Objectors Holmquist, Mahlum, Rasmussen, Blalock, Seeley-Buckland-Piccolo, Ward, Gee, Shepard, Jeseritz, and Hoff are in default. They no longer have status as Parties.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

### FINDINGS OF FACT

#### General

1. Application for Beneficial Water Use Permit 41I-117746 in the name of Mineral Rights Unlimited, LLC, and signed by Lee Reynolds, Jr., was filed with the Department on May 12, 2000. (Department file)
2. The Environmental Assessment (EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding.
3. Applicant seeks to appropriate 116 gallons per minute (gpm) up to 9 acre-feet of water per year from groundwater pits located Holmes Gulch between the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  and SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 1, Township 09 North, Range 03 West, Jefferson County Montana. The proposed means of diversion are groundwater pits. The proposed period of appropriation and period of use is from January 1 to December 31, inclusive, of each year. The proposed use is for mining. The proposed place of use is the N $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 1, Township 09 North, Range 03 West, Jefferson County Montana. In addition to the groundwater pits, water will be stored in three re-circulation ponds which have a total storage volume of 1.2 acre-feet. (Department file)

#### Physical Availability

4. Applicant used the Orsborn formula to estimate the average annual discharge from the Holmes Gulch watershed. The Orsborn formula is used to estimate average annual surface flow in ungaged basins. Holmes Gulch has no surface flow, so Applicant's consultant used the water volume predicted by the Orsborn formula to show what volume of water is available to groundwater in the basin. No evidence was presented to

show how much of the water volume the Orsborn formula predicts is available to Applicant in the proposed shallow pits.

5. Applicant had adequate water to operate the facility for the mining done in the year 2000. In past operations Applicant's well has been used to supplement the water from the groundwater pits. It is not clear that all of the water used in the year 2000 came from the groundwater pit or if Applicant's well also provided some portion of the water.

6. The Department application file reports were reviewed by Applicant's hydrologist; however, Applicant provided no additional hydrologic evidence to show water is available. (Department file, testimony of Dan March, Dan Prebil, Jim Beck)

#### Legal Availability

7. Applicant relies on the fact that water which does not evaporate from the settling ponds is returned to the groundwater by seepage from the settling ponds to show the water is still available for any downstream rights. However, water flows in Objector Kleffner's pipeline above the repair made after the pipeline rupture were reduced at times water was used in the mining operation.

8. Objector Kleffner's flow returned after the Applicant's use from the groundwater pit which is the subject of this application was stopped.

9. Objector Wiese reported flow reductions into a stock tank from her well during the 2000 mining operations that quadrupled the time to fill the stock tank. Objector Wiese's water comes from wells. The record does not show whether these flow reductions are coincidental or are the effect of Applicant's use of groundwater from the pit.

10. Applicant's consultant could not explain these effects to the Objector water sources. The record contains no hard evidence to show the water proposed for diversion is not destined for the prior rights of Kleffner or Wiese. (Department file, testimony of Alice Dove, Lynn Hall Wiese)

### **Adverse Effect**

11. Two Objectors saw an effect to their flows during the time Applicant's mining operation was ongoing. Objector Kleffner had adequate spring water during a portion of this time because they were not home, thus not using the water. When they returned, they set about to find and fix the cause of their water shortage. Their flows returned only after Applicant's water use ceased. Objector Wiese experienced reduced flow from her wells. The record does not show whether her reduced flows are a result of lower water level in her wells or other factors. Applicant's expert indicated the likely cause was not Applicant's water use, but offered no additional evidence that might explain the coincidence.

12. Applicant did not provide any other information on adverse effect. (Department file and records, testimony of Dan March, Alice Dove, Lynn Hall Wiese)

### **Adequacy of Appropriation Works**

13. The Department staff viewed the means of diversion and confirmed that it can pump the requested 116 gpm. Applicant has used the diversion works and placer mining operation to recover gold metal. (Department file, testimony of Dan Prebil, Jim Beck)

### **Beneficial Use**

14. Applicant proposed use is for mining. The use of water for mining is a recognized beneficial use of water.

15. Applicant has recovered gold from the site and received payment from plant operation in 2000. The use of 116 gallons per minute up to 9 acre-feet of water per year from groundwater pits with storage in three circulation ponds having a total of 1.2 acre-feet is reasonable for the mining operation plans of the Applicant. (Department file, testimony of Dan Prebil)

### **Possessory Interest**

16. Applicant provided a lease agreement on the properties on which Applicant seeks to put the water to beneficial use.

17. There is an ongoing dispute over the meaning of Applicant's lease agreement with the landowner at the place of use, Objector Day Spring

Land Company. Applicant has voluntarily stopped mining pending resolution of the lease dispute and other matters. I decline to decide a contract issue in this matter.

18. Objectors have established that they have a dispute over the language of the agreement. There is no evidence of any court action voiding the agreement. Absent a dispute over the language of the agreement, Applicant would have a possessory interest in the place of use by reason of the agreement. (Department file, testimony of Ken Diehl, Dan Prebil)

#### **Water Quality Issues**

19. One valid objection relative to water quality was filed against this application; thus, Applicant has the burden to show the water quality of prior appropriators would not be adversely affected by this use of water.

20. The materials being mined are spoils from dredging activities of the 1930's or 1940's. Applicant's expert testified that the water would be removed from the ground, used in the placer mining operation, seep back to the groundwater from the settling ponds, and that no chemicals would be added by the Applicant in the mining operation that would degrade the water quality.

21. The record does not show that the material being mined and coming in contact with the water during the placer operation does not have contaminants that will diminish the water quality of prior appropriators to where it is no longer usable for the historic uses. (Department file, testimony of Dan March)

#### **Basin Closure**

22. The proposal is for groundwater from shallow pits in Holmes Gulch which is in the Upper Missouri River basin closure area. No new consumptive water use permits may be issued in the closure area. Exceptions to the closure include permits for groundwater. (Department file, Department records)

Based on the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:



### CONCLUSIONS OF LAW

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. § 85-2-311 by a preponderance of the evidence. Mont. Code Ann. § 85-2-311(1).
2. A permit shall be issued if there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, and in the amount requested; the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state reservation will not be adversely affected; the proposed means of diversion, construction, and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected, the proposed use will be substantially in accordance with the classification of water, and the ability of a discharge permitholder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. § 85-2-311 (1) (a) through (h).
3. The Applicant has not proven by a preponderance of evidence that water is physically available at the proposed point of diversion in the amount applicants seeks to appropriate, and in the amount requested. Mont. Code Ann. § 85-2-311(1)(a)(i). Mont. Code Ann. § 85-2-311 (5) states "To meet the preponderance of evidence standard in this section, the applicant...shall submit hydrologic or other evidence...." Department reports can be used to meet this statutory requirement, but the Hearing Examiner does not believe that can be read to mean "wait until the Department has it's application review reports in the file and have a professional critique them." Applicant here did not present hydrologic evidence other than their expert's testimony that he did not disagree with the department reports, and the Orsborn formula. That is not sufficient to meet Applicant's

burden of proof on the issue of physical availability of water. See, Finding of Fact Nos. 4, 5, 6.

4. The Applicant has not proven by a preponderance of the evidence that water can reasonably be considered legally available. Mont. Code Ann. § 85-2-311(1)(a)(ii). See, Finding of Fact Nos. 7, 8, 9, 10.

5. The Applicant has not proven by a preponderance of the evidence that the water rights of prior appropriators under existing water rights will not be adversely effected. Mont. Code Ann. § 85-2-311(1)(b). See, Finding of Fact Nos. 11, 12.

6. The Applicant has proven that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Code Ann. § 85-2-311(1)(c). See, Finding of Fact No. 13.

7. The Applicant has proven that the proposed use of water is a beneficial use of water. Mont. Code Ann. § 85-2-311(1)(d). See, Finding of Fact Nos. 14, 15.

8. The Applicant has proven a possessory interest in the property where the water is to be put to beneficial use. Mont. Code Ann. § 85-2-311(1)(e). See, Finding of Fact Nos. 16, 17, 18.

9. Applicant has not proven by a preponderance of evidence that the water quality of a prior appropriator will not be adversely affected. Mont. Code. Ann. § 85-2-311(1)(f). See, Finding of Fact Nos. 19, 20, 21.

10. No objection was raised as to the issue of the proposed use not being in accordance with a classification of water, or as to the ability of a discharge permitholder to satisfy effluent limitations of a permit. Mont. Code Ann. § 85-2-311(1)(g) and (h).

11. The Upper Missouri River basin closure does not apply to the application. Mont. Code Ann. § 85-2-343. See, Finding of Fact No. 22.

12. The Department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for issuance of a beneficial water use permit. The Applicant has provided no term or condition that would satisfy the burden of establishing physical availability, legal availability, or lack of adverse effect. Mont. Code Ann. § 85-2-312.

13. The Department cannot grant a permit to appropriate water unless the Applicant proves all of the 85-2-311 criteria by a preponderance of the evidence. Since Applicant has not proven physical availability, legal availability, or lack of adverse effect by a preponderance of the evidence, a permit may not be granted.

**WHEREFORE**, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

**PROPOSED ORDER**

Application for Beneficial Water Use Permit 41I-111746 is hereby **DENIED**.

**NOTICE**

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral argument. The exceptions and brief must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses and a response brief to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 15<sup>th</sup> day of February, 2002.



Charles F Brasen  
Hearings Officer  
Water Resources Division  
Department of Natural Resources  
and Conservation  
PO Box 201601  
Helena, Montana 59620-1601

### CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Hearing Notice, Appointment of Hearing Examiner, and Discovery Order was served upon all parties listed below on this

25<sup>th</sup> day of February, 2002.

MINERAL RIGHTS UNLIMITED LLC  
55 S FEE ST  
HELENA MT 59601-5556

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CLANCY MT 59634

GLENN BLALOCK  
34 HOMESTEAD ESTATES  
CLANCY MT 59634

DAY SPRING LAND COMPANY  
5003 CANYON FERRY ROAD  
EAST HELENA MT 59635

MARVIN HOLMQUIST  
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KLEFFNER FAMILY TRUST  
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ROBERT AND LINDA SEELEY-BUCKLAND-  
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CATHY M WARD  
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CARL HATCH  
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ROBERT SHEPARD  
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57 HOMESTEAD ESTATES  
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Jennifer L. Hensley  
Hearings Unit  
406-444-6615

# CASE #